RECORD AND BRIEF

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In the Supreme Court of the United States

MICHELLE K. LEE, DIRECTOR,
UNITED STATES PATENT AND TRADEMARK OFFICE,
PETITIONER

v.

SIMON SHIAO TAM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Jewish Committee (AJC) is a nonpartisan, nonprofit organization established in 1906 to protect the civil and religious rights of the Jewish people.[1]

[1] Pursuant to Rule 37.6, AJC affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than AJC, its members, or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

More than 100 years later, AJC now has roughly 170,000 members and supporters, and 32 regional offices and representatives, spread across the Nation and throughout the world.

AJC's mission is to enhance the well-being of the Jewish people and to advance human rights and democratic values for all. AJC has a longstanding commitment to free speech, which it views as a basic human right. Accordingly, AJC has participated as an amicus curiae in many free speech cases before this Court. See, *e.g.*, *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009); *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). Through its Jacob Blaustein Institute for the Advancement of Human Rights, AJC has championed free speech in the United States, at the United Nations, and around the globe.

To ensure that speech can freely flourish in our Nation, AJC believes that courts must rigorously subject viewpoint- and content-based laws to strict scrutiny. At the same time, the government must have leeway to express its own viewpoints and to direct government subsidies in ways that further the government's policy goals. AJC submits this brief to help ensure that the proper balance is struck between those competing and important interests.

SUMMARY OF ARGUMENT

AJC agrees with respondent that this Court should apply strict scrutiny in determining whether the disparagement clause of Section 2(a) of the Lanham Act violates the First Amendment. That clause discriminates against speech based on viewpoint, which automatically triggers strict scrutiny. Petitioner contends that a re-

laxed standard of review is warranted because the government has an interest in distancing itself from offensive trademarks and because trademark registration amounts to a discretionary government subsidy. Petitioner is wrong on both counts.

A. The First Amendment contains no general exception that applies whenever the government wants to disassociate itself from offensive speech. The only time this Court has credited that interest is when the government itself was speaking. But the government does not speak through trademarks, trademark registrations, or published notices of registered marks.

Trademarks themselves constitute private speech, and registration does not alter that fact. The act of registration is not itself government speech, and Congress did not enact the Lanham Act to promote a government message about disparagement. What is more, the public does not associate registered trademarks with the government, nor could it reasonably do so: the Patent and Trademark Office has expressly disclaimed approval of the content of registered trademarks, and it registers countless marks that no reasonable person would think the government was endorsing. The government also has little control over the content of trademarks, aside from its initial decision whether or not to register the mark.

Petitioner errs in suggesting that government speech is at issue merely because, incident to trademark registration, the government will have to include a registered mark in various official documents. This Court has never expanded the government-speech doctrine to cases in which the government was acting in an administrative capacity, rather than as a contributor of a distinctive viewpoint to the marketplace of ideas. Nor should the Court do so. If the eventual reporting of a government

action related to private speech could transform the action itself into government speech, virtually all regulation of private speech would constitute government speech and would thus be exempt from First Amendment scrutiny altogether. And for those government actions that would not otherwise constitute government speech, the government need only add a reporting requirement, which would function as a trump card to any First Amendment challenge. That should not be, and is not, the law.

B. This Court has applied relaxed scrutiny when reviewing content-based conditions on the receipt of government subsidies. But the Court has never applied that doctrine outside the context of cash subsidies or their functional equivalent. That is an important limitation, because it ensures that the government-subsidy exception does not swallow the First Amendment whole. And even if trademark registration were to qualify as a "subsidy," strict scrutiny would still apply. The government-subsidy exception does not authorize the government to target disfavored viewpoints, but that is exactly what Section 2(a)'s disparagement clause does. In addition, unlike the laws at issue in other government-subsidy cases, the disparagement clause does not serve the goals of the broader statute: here, to protect mark holders from unfair competition and to prevent market confusion.

Because this case involves neither government speech nor a government subsidy, the Court should review Section 2(a)'s disparagement clause under strict scrutiny. And under strict scrutiny, the judgment of the court of appeals should be affirmed.

ARGUMENT

THE DISPARAGEMENT CLAUSE OF SECTION 2(a) OF THE LANHAM ACT IS SUBJECT TO STRICT SCRUTINY

Section 2(a) of the Lanham Act, 15 U.S.C. 1052(a), excludes from the benefits of federal registration trademarks that "disparage * * * persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." But the First Amendment prevents Congress from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The question presented here is whether Section 2(a)'s disparagement clause violates the First Amendment.

In the decision below, the court of appeals held that Section 2(a)'s disparagement clause discriminates based on viewpoint and therefore must undergo strict scrutiny. Pet. App. 16a-27a; see Resp. Br. 15-19. In response, petitioner contends that lower scrutiny is warranted because, *inter alia*, the government has an interest in "disassociat[ing] itself from offensive communications," Pet. Br. 39, and because trademark registration is a discretionary government subsidy, see *id.* at 14-19, 28-31. Neither rationale exempts Section 2(a) from strict scrutiny.

A. The Government's Interest In 'Disassociating Itself' From Objectionable Speech Does Not Exempt Section 2(a)'s Disparagement Clause From Strict Scrutiny

It is a familiar principle that the First Amendment requires the government to satisfy strict scrutiny if it discriminates against a private speaker whose viewpoint it disfavors. See, *e.g.*, *Reed*, 135 S. Ct. at 2227, 2230. But if the government itself is the speaker, the First Amendment does not apply at all. See *Walker* v. *Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct.

2239, 2245-2246 (2015). In that case, the government is free to craft the content of its own speech—including refusing to communicate a message it finds objectionable. See *id.* at 2252-2253.

Petitioner contends that Section 2(a)'s disparagement clause is exempt from strict scrutiny because the government has an interest in distancing itself from offensive speech. See Pet. Br. 37-41. But the government does not speak through trademarks, trademark registrations, or published notices of registered marks. The government-speech doctrine thus does not apply, which means that strict scrutiny does.

1. Unless It Is Speaking, The Government Cannot Discriminate Against Disfavored Speech

a. It should go without saying that the First Amendment contains no general exception for speech the government finds objectionable. See, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 464-465 (2010) (depictions of animal cruelty); *Texas* v. *Johnson*, 491 U.S. 397, 400 (1989) (flag burning); *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 43-44 (1977) (per curiam) (Nazi parade); *Brandenburg* v. *Ohio*, 395 U.S. 444, 444-447 (1969) (per curiam) (Ku Klux Klan rally). The First Amendment likewise contains no general exception that applies whenever the government wants to "disassociate itself from offensive communications." Pet. Br. 39. After all, the entire public-forum doctrine rests on the notion that the government, even in a forum it controls, has limited discretion to decide "which issues are worth discussing" and which "views" may be "express[ed]." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). The government has never been able to defend viewpoint discrimination simply on the ground that the public might associate a controversial viewpoint with the gov-

ernment. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 113-114 (2001); *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995); *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981).

b. This Court has exempted viewpoint discrimination from strict scrutiny only when the government itself was speaking. Viewpoint discrimination poses no problem in the context of government speech, because the Free Speech Clause does not prevent the government from "determining the content of what it says." *Walker*, 135 S. Ct. at 2245.[2] As long as it is speaking, the government can refuse to espouse viewpoints with which it does not wish to be associated.

Walker illustrates the point. That case involved a program run by the State of Texas that allowed nonprofit organizations to submit license-plate designs for state approval. See 135 S. Ct. at 2244-2245. Under that program, the Sons of Confederate Veterans submitted a license-plate design that displayed the Confederate battle flag. See *id.* at 2245. The State refused to approve the design, voicing a concern that "many members of the general public [would] find the design offensive." *Ibid.* The Court permitted that viewpoint-based rejection without applying strict scrutiny. See *id.* at 2249-2250. The State could refuse to approve the design, the Court explained, because messages on its license plates constituted government speech. See *id.* at 2250.

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[2] This Court has held that the Establishment Clause can limit the government's ability to espouse religious viewpoints in certain circumstances. See, *e.g.*, *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844, 867-873 (2005); *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 301-309 (2000). That line of cases is not implicated here.

Rust v. *Sullivan*, 500 U.S. 173 (1991), is to the same effect. At issue there was a federal funding program that provided grants to medical clinics for preventative family-planning services. See *id.* at 178-179. As a condition of the funding, Congress prohibited recipients from discussing abortion as a method of family planning. See *ibid.* The Court upheld the condition under the First Amendment without applying strict scrutiny. See *id.* at 192-195. As the Court later explained, the condition was permissible because government speech was at issue. See *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 540-541 (2001); *Rosenberger*, 515 U.S. at 833. Although the government was not directly the speaker, it was using private grantees to convey a message to the public—namely, that abortion is not "an appropriate method of family planning." *Rust*, 500 U.S. at 180; see *Velazquez*, 531 U.S. at 540-541. Because the government was speaking to the public, albeit indirectly, it could disassociate itself from contrary views.

2. *The Government Does Not Speak Through The Trademark-Registration Regime*

This Court has identified three factors for determining whether the government-speech doctrine applies. First, has the government traditionally used the relevant medium to "speak to the public"? *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 470 (2009). Second, would the public "routinely—and reasonably—interpret [the medium] as conveying some message on the [government]'s behalf"? *Id.* at 471. Third, does the government "maintain[] direct control over the messages conveyed" in the medium? *Walker*, 135 S. Ct. at 2249.

When those factors are applied here, it is clear that the government does not speak through the trademark-registration regime. The disparagement clause of Sec-

tion 2(a) of the Lanham Act should therefore be subject to strict scrutiny.

a. To begin with, the government does not "speak to the public" through registered trademarks themselves. *Summum*, 555 U.S. at 470. As defined by the Lanham Act, a trademark is "any word, name, symbol, or device" used "to identify and distinguish" goods and "to indicate the source of the goods." 15 U.S.C. 1127. A trademark is quintessential private speech: the "primary object" of a trademark is to transmit a message from a vendor to a consumer about "the origin of the article to which it is affixed." *Kidd* v. *Johnson*, 100 U.S. (10 Otto) 617, 620 (1880).

Federal registration does not transform a trademark from private speech into government speech. The act of registration involves listing the trademark in the "principal register." 15 U.S.C. 1051(a). Although "not entirely clear" from the statutory definition, the principal register is essentially an internal set of government files that simply list registered marks. Pet. App. 45a. Registration thus amounts to little more than an administrative action; the government does not "convey[] a government message" to anyone during that process, much less to the public at large. *Summum*, 555 U.S. at 470, 472.

Notably, registration does not give the government any control over the use of the trademark. "When a trademark is registered," the mark holder's "common law rights continue." 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 19:3, at 19-23 (4th ed. 1996) (McCarthy). Those rights include the right to use the mark exclusively. See *Trade-Mark Cases*, 100 U.S. (10 Otto) 82, 92 (1879). Registration merely confers certain additional benefits on a mark holder, such as a presumption of validity. See 15 U.S.C. 1057(b).

After registration, then, a trademark remains private speech, with the mark holder continuing to use the mark to transmit a message to consumers.

Congress, moreover, did not enact the Lanham Act to communicate any broad "programmatic message" about the use of disparaging words or images. *Velazquez*, 531 U.S. at 548. The Lanham Act is regulatory in nature. It aims to prevent the use of "deceptive and misleading" marks in interstate commerce; to "protect registered marks" from "interference by [local] legislation"; to prevent "unfair competition"; to stop "fraud and deception" through the improper use of registered marks; and to ensure compliance with certain "treaties and conventions." 15 U.S.C. 1127; see S. Rep. No. 1333, 79th Cong., 2d Sess. 3-5 (1946). There is no evidence that Congress passed the Act to make a statement about disparagement. To the contrary, the legislative history surrounding Section 2(a)'s disparagement clause suggests that Congress adopted it to protect the names of respected figures and institutions, not to communicate a message about disparagement. See *Trade-Marks: Hearings on H.R. 4744 Before the Subcomm. on Trade-Marks of the H. Comm. on Patents*, 76th Cong., 1st Sess. 19-21 (1939) (citing "Abraham Lincoln gin," "George Washington coffee," the "New York Athletic Club," and "Harvard University").

b. In addition, the public is unlikely to attribute the message embodied in registered trademarks to the government. At the time of registration, the public already associates the mark with the mark holder. The Lanham Act "provides only for registration of existing marks," *In re ECCS, Inc.*, 94 F.3d 1578, 1579 (Fed. Cir. 1996), and "it is use of a mark in the marketplace that creates a trademark" in the first place, 3 McCarthy § 19:8, at 19-33. Registration does permit the mark-holder to use the

® symbol with the mark. See 15 U.S.C. 1111. But it is farfetched to think the public would consider a trademark a government message merely by virtue of that symbol.

It would be similarly unreasonable for the public to view the act of trademark registration as government speech approving of the message communicated in a registered mark. The Patent and Trademark Office has made clear that "the act of registration is not a government imprimatur or pronouncement that the mark is a 'good' one in an aesthetic, or any analogous, sense." *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219 n.3 (T.T.A.B. 1993). Consistent with that view, the Office has registered countless trademarks that no reasonable person would think the government endorses. See, *e.g.*, Pet. App. 43a (listing marks such as GANJA UNIVERSITY and MURDER 4 HIRE); Pro-Football Cert. Br. 11 (listing numerous offensive marks).

c. The government also does not "maintain[] direct control over the messages conveyed" through trademarks. *Walker*, 135 S. Ct. at 2249. A mark's design comes entirely from the mark holder's imagination. The government has no editorial say as to a mark's content; it can only choose either to register or not to register the mark. The mark holder is also free to use its mark as it sees fit after registration. That means a mark holder could incorporate its mark in advertisements containing any variety of objectionable speech—including "crude references to women," "racial slurs and white-supremacist slogans," and "demeaning illustrations of * * * religious figures," Pet. Br. 28—without any oversight from the Patent and Trademark Office. This is not a situation, therefore, where the government "retains absolute veto power over the [relevant] content,

right down to the wording." *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 563 (2005).

d. In response, petitioner points out that "the federal government, in administering the trademark-registration program, issues certificates of registration, publishes registered marks, and transmits registration information to foreign countries." Pet. Br. 37. Petitioner argues that the government must be permitted to exclude disparaging marks from those "official communications" without being subject to strict scrutiny. *Ibid.*

Petitioner's position has superficial appeal, but it ultimately proves too much. In essence, the government is claiming that, without the ability to discriminate based on viewpoint, it may have to issue a report that contains objectionable speech. But if the mere act of reporting a government action related to private speech could transform the action itself into government speech, then almost all regulation of private speech would constitute government speech. And for regulation that does not, the government could simply add a reporting requirement to avoid First Amendment scrutiny. As the court of appeals recognized:

> The government could record recipients of parade permits in an official database or publish them weekly, thus insulating content-based grants of these permits from judicial review. Governmental agencies could assign TV and radio licenses and [S]tates could refuse to license medical doctors with no First Amendment oversight by "registering" these licenses in an online database, or by allowing licensees to display a mark by their name.

Pet. App. 45a-46a.

Not surprisingly, this Court's cases applying the government-speech doctrine do not support petitioner's po-

sition. In each of those cases, the government had consciously used a certain medium to advance to the public "its own message" or viewpoint on a particular matter. *Rosenberger*, 515 U.S. at 833. *Walker* involved license plates, which the State used "to urge action, to promote tourism, and to tout local industries." See 135 S. Ct. at 2248. *Summum* involved monuments on public land, which a local government used to "present[] the image of the City that it wishe[d] to project." 555 U.S. at 473. And as discussed above, *Rust* involved the use of a grant program conveying the government's viewpoint that abortion is not "an appropriate method of family planning." 500 U.S. at 180.

This case is quite different. Here, the government is claiming to "speak" not in the communication of its viewpoint to the public, but rather "in the exercise of its managerial or regulatory responsibilities." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1408, 1428-1432 (2001). This Court has never expanded the government-speech doctrine that far, and it should not do so here. Such a decision "would have potentially vast and limitless consequences." *Id.* at 1408.

To cite just one example, petitioner's expansive view of the government-speech doctrine would apply to copyrights just as it does to trademarks. As in trademark law, a copyright holder can secure certain rights and benefits by registering the copyright with the government. See 17 U.S.C. 408-412. And as in trademark law, the government issues a certificate of registration to a successful applicant. See 17 U.S.C. 410(a). If that alone is sufficient to transform the copyrighted content into government speech, the government can deny registra-

tion for, and thus deter the creation of, otherwise copyrightable content it finds objectionable.[3]

The First Amendment would not permit such blatant censorship in that context, and it does not do so here. The government does not speak through trademarks, trademark registrations, or published notices of registered marks. The government's purported interest in disassociating itself from objectionable trademarks therefore does not exempt Section 2(a)'s disparagement clause from strict scrutiny.

B. The Government-Subsidy Exception Does Not Exempt Section 2(a)'s Disparagement Clause From Strict Scrutiny

In a line of related cases, this Court has also refused to apply strict scrutiny to content-based conditions placed on the receipt of government subsidies. For example, in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court applied a relaxed standard of review in upholding tax breaks offered to certain charitable entities as long as they did not engage in substantial lobbying activities. *Id.* at 543-544. In cases involving government subsidies, the Court has explained, "the [g]overnment is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196.

At the same time, however, the government "cannot recast a condition on funding as a mere definition of its

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[3] A holding that administrative actions by the government qualify as government speech may also cast doubt on some of this Court's state-action decisions. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177 (1972) (holding that the issuance of a liquor license does not constitute state action under the Fourteenth Amendment).

program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez*, 531 U.S. at 547. The Court accordingly has kept the government-subsidy exception within certain bounds, three of which are relevant here. First, the Court has never applied the exception beyond cash subsidies or their functional equivalent. Second, the Court has never permitted the government to target disfavored viewpoints. And third, the Court has typically approved only conditions that further the core purpose of the underlying program. As we will now explain, applying the government-subsidy exception in this case would transgress each of those bounds.

1. Trademark Registration Is Not A 'Subsidy'

a. Every one of this Court's speech cases applying the government-subsidy doctrine has involved a cash payment or its functional equivalent. See, *e.g.*, *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 133 S. Ct. 2321, 2324 (2013); *Ysursa* v. *Pocatello Education Ass'n*, 555 U.S. 353, 355 (2009); *Davenport* v. *Washington Education Ass'n*, 551 U.S. 177, 181-182 (2007); *Velazquez*, 531 U.S. at 536-537; *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 573 (1998); *Regan*, 461 U.S. at 544. The Court "has never extended" the government-subsidy exception to "situations not involving financial benefits." *Autor* v. *Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014).

This case does not involve a cash payment or its functional equivalent. Congress enacted the Lanham Act pursuant to its authority under the Commerce Clause, not the Spending Clause. See 15 U.S.C. 1051, 1127; see 1 McCarthy § 6:2, at 6-3 to 6-5 (discussing the *Trade-Mark Cases*, *supra*). And the trademark-registration regime serves a quintessentially regulatory function,

governing the relationship between a mark holder and a potential infringer. See 15 U.S.C. 1127; S. Rep. No. 1333, 79th Cong., 2d Sess. 3-5 (1946). A mark holder whose mark is registered may receive a benefit, but it does not receive any government funding.

It is important for the Court to maintain the cash-payment limitation on what qualifies as a "subsidy" under the government-subsidy exception. Absent such a limiting principle, the government-subsidy exception would swallow the First Amendment whole. All "[p]roperty rights are created by the State," *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 626 (2001); under an expansive definition of "subsidy," any such right could be considered a government benefit. Incidental government support for speech could also qualify, such as the closing of roads for parades, see *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 561 (1995), or a school's operation of a public forum, see *Good News Club*, 533 U.S. at 106-107. If unmoored from any reasonable limitation, the government-subsidy exception would bestow an enormous power on the government to regulate speech, subject only to rational-basis review. Applying the exception only to cash payments or their functional equivalents confines the exception within reasonable bounds.

b. Contrary to petitioner's suggestion, see Pet. Br. 41, this Court's decisions in *Davenport* and *Ysursa* fit comfortably within the cash-payment limitation. In each case, the Court addressed a law limiting the ability of public-sector unions to use agency-shop fees on electioneering activity. See *Ysursa*, 555 U.S. at 356; *Davenport*, 551 U.S. at 181-182. The fees amounted to cash subsidies: the government provided the unions with an entitlement to receive cash, albeit from the employees' paychecks rather than the general public coffers. As a

result, what the unions ultimately received from the government was a direct financial benefit.

What is more, *Davenport* and *Ysursa* implicated concerns about compelled speech not at issue here. In *Knox* v. *Service Employees*, 132 S. Ct. 2277 (2012), this Court recognized the "general rule" that "individuals should not be compelled to subsidize private groups or private speech." *Id.* at 2295. It makes sense that the government may have more leeway to enact content-based restrictions in cases raising concerns about forcing non-union employees to fund union electioneering activities. In all events, this case plainly does not involve a cash payment or its functional equivalent, and the government-subsidy exception is thus inapplicable.

2. *A Government Subsidy Cannot Target Disfavored Viewpoints*

Even if trademark registration somehow constituted a government subsidy, strict scrutiny would still be warranted. Congress has targeted certain ideas through the disparagement provision in Section 2(a), and that is not permitted by the government-subsidy exception.

a. Virtually all of this Court's decisions upholding conditions on government funding have involved content-based restrictions. See *Ysursa*, 555 U.S. at 356 (limitation on spending funds for electioneering activity); *Davenport*, 551 U.S. at 181-182 (same); *United States* v. *American Library Ass'n*, 539 U.S. 194, 199 (2003) (requirement that libraries receiving federal funds "block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them"); *Finley*, 524 U.S. at 572 (requirement that the National Council for the Arts consider "general standards of decency and respect for the diverse beliefs and values of the American public" when

providing grants); *Regan*, 461 U.S. at 542 (requirement that charitable nonprofit organizations not engage in lobbying activities as a condition of receiving a tax break). *Rust* stands out as the obvious exception: the Court there did permit viewpoint discrimination, upholding a requirement that grant recipients could not promote abortions as a method of family planning. See 500 U.S. at 178-180.

Rust, however, does not stand for the general proposition that the government can discriminate on the basis of viewpoint in the provision of subsidies. The Court has long held that the "discriminatory denial of a tax exemption" "frankly aimed at the suppression of dangerous ideas" is a "limitation on free speech." *Speiser* v. *Randall*, 357 U.S. 513, 518-519 (1958). Time and again, the Court has reiterated that warning in the context of government subsidies. See, *e.g.*, *Finley*, 524 U.S. at 587 (stating that, "[i]f the [National Endowment for the Arts] were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case"); *Regan*, 461 U.S. at 548 (noting that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas'" (second alteration in original; citation omitted)); cf. *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) (stating that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints").

Moreover, as this Court explained in its subsequent decision in *Velaquez*, *Rust* is unique because it is best understood as a government-speech case (notwithstanding the presence of government funding). *Velazquez* involved a restriction on federal grants to legal-aid pro-

grams forbidding attorneys from challenging the validity of existing welfare laws. See 531 U.S. at 537. The Court invalidated that restriction as violating the First Amendment. See *id.* at 540-549. In so doing, the Court noted that it had sustained "viewpoint-based funding decisions" when "the government is itself the speaker" or when "the government used private speakers to transmit specific information pertaining to its own program." *Id.* at 541 (internal quotation marks and citations omitted). But when the government program "was designed to facilitate private speech," the Court continued, the First Amendment prohibited viewpoint discrimination. *Id.* at 542. To demonstrate the distinction, the Court contrasted the case at hand with *Rust*: there was a "programmatic message" in *Rust*, permitting a viewpoint-based condition, but there was no such message in *Velazquez*, so the viewpoint-based condition violated the First Amendment. *Id.* at 547-548.

b. As the foregoing cases demonstrate, even if trademark registration somehow constituted a government subsidy, the disparagement clause in Section 2(a) of the Lanham Act would be subject to strict scrutiny. That clause expressly targets any trademark that "disparage[s] * * * persons, living or dead, institutions, beliefs, or national symbols, or bring[s] them into contempt, or disrepute." 15 U.S.C. 1052(a). By any measure, that is a viewpoint-based restriction. See Pet. App. 16a-27a; Resp. Br. 15-19. And as discussed above, the Lanham Act does not involve government speech; it exists to promote the use of trademarks, a form of private speech. See p. 10, *supra*. The disparagement clause is therefore subject to strict scrutiny regardless of whether trademark registration is a subsidy.

3. *Section 2(a)'s Disparagement Clause Does Not Serve The Goals Of The Lanham Act*

When this Court has applied relaxed scrutiny to speech-related funding conditions, that is generally because the condition serves the program's central goals. In *Rust*, for example, Congress designed its spending program to "encourage family planning," not provide for "prenatal care." 500 U.S. at 193. The limitation on discussing abortions at issue there made good sense, as abortions by definition occur after conception. See *id.* at 193-194. In *Regan*, the tax provision at issue eliminated the tax burden on certain charitable entities. See 26 U.S.C. 501(c)(3). A restriction on lobbying activities sensibly ensured that those entities did not "use tax-deductible contributions to lobby to promote the private interests of their members." 461 U.S. at 550. And in *Davenport* and *Ysursa*, the agency-shop fees at issue were designed to prevent unaffiliated employees from free-riding on the benefits unions provide in collective bargaining. See *Harris* v. *Quinn*, 134 S. Ct. 2618, 2627 (2014). A restriction on using those fees for electioneering activities ensured that the fees actually paid for activities "germane" to collective bargaining. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); see *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 233-236 (1977).

A ban on the registration of disparaging trademarks does not further the Lanham Act's goals in even a remotely comparable fashion. Such a ban does not prevent the use of "deceptive and misleading" marks in interstate commerce; "protect registered marks" from "interference by [local] legislation"; prevent "unfair competition"; or stop "fraud and deception" through the improper use of registered marks. 15 U.S.C. 1127.

To be sure, Congress also enacted the Lanham Act to bring the United States into compliance with certain treaties and conventions. See 15 U.S.C. 1127. But neither of the relevant treaties *required* signatories to refuse to register disparaging marks; they simply permitted the practice at the signatories' discretion. See General Inter-American Convention for Trade Mark and Commercial Protection, Art. 3, §§ 3-4, 46 Stat. 2916, 2914-2916, Feb. 20, 1929, T.S. No. 833; Paris Convention for the Protection of Industrial Property, Art. 6, 25 Stat. 1372, 1376, Mar. 20, 1883. And if anything, in enacting the disparagement clause, Congress seemed most concerned with the protection of respected American public figures and institutions, not adherence to international norms. See p. 10, *supra*.

* * * * *

In the end, the disparagement clause of Section 2(a) of the Lanham Act must survive strict scrutiny in order to avoid invalidation. That is the normal standard of review for laws that discriminate on the basis of viewpoint. The government's purported interest in disassociating itself from offensive speech does not warrant a lower standard of review, because this case does not involve government speech. Nor does the government-subsidy exception apply. Trademark registration is not a subsidy, and the disparagement clause targets a disfavored viewpoint and does not further the Lanham Act's goals. The court of appeals correctly applied strict scrutiny to Section 2(a)'s disparagement clause, and its judgment should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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